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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
5

6 REBECCA A. YOUNG,

7
8 Plaintiff,

9 vs.

10 UNITED OF OMAHA LIFE
11 INSURANCE COMPANY,

12 Defendant.
13

NO. 2:15-CV-00120-JLQ

MEMORANDUM OPINION AND
ORDER RE: MOTION FOR
JUDGMENT ON RECORD

14 BEFORE THE COURT is Plaintiff Rebecca Young's Motion for Judgment on the
15 Record (ECF No. 26). Response and Reply briefs have been filed. Plaintiff is
16 represented by George Fields. Defendant is represented by Gabriel Baker and D. Michael
17 Reilly. Neither party requested oral argument and the matter was submitted on the briefs.

18 **I. Introduction and Procedural History**

19 Plaintiff filed her Complaint on May 1, 2015, alleging she was wrongfully denied
20 disability benefits by Defendant. Plaintiff claims that under the Employee Retirement
21 Income Security Act, ("ERISA"), 29 U.S.C. § 1132, she is entitled to long-term disability
22 benefits. Defendant filed an Answer admitting Plaintiff made a claim for long-term
23 disability benefits and Defendant determined she was not eligible. Defendant admits that
24 as part of its evaluation of Plaintiff's claim surveillance of the Plaintiff was conducted and
25 a video recording and surveillance report were created. (ECF No. 11 , ¶ 26-30).
26 Defendant maintains the determination Plaintiff was not eligible was correct under the
27 terms of Policy # GLTD-AASY (the "Policy") which was issued to Plaintiff's employer,
28 Spokane Teachers' Credit Union ("STCU") by Defendant.

1 The Administrative Record has been filed under seal. The parties have stipulated
2 the appropriate standard of review is de novo. (ECF No. 25). The parties have further
3 agreed the Administrative Record is complete, and there is no need for additional
4 discovery. (*Id.*).

5 **II. Discussion**

6 **A. The Parties' Arguments**

7 Plaintiff contends her primary treating physicians, as well as the Defendant's
8 evaluating physician, support her claim for benefits. Plaintiff contends Defendant
9 wrongfully relied on insufficiently probative video surveillance evidence in denying
10 Plaintiff's claim. Plaintiff contends she was "disabled under the 'regular occupation'
11 standard" set forth in the Policy. (ECF No. 26, p. 3). Defendant responds Plaintiff cannot
12 meet her burden of proof, and must prove a significant change in mental or physical
13 functional capacity has occurred which prevents her from performing at least one of the
14 material duties of her regular occupation. (ECF No. 31, p. 1-2). Defendant argues
15 Plaintiff remained able to work despite her symptoms, and her symptoms were
16 improving. Defendant contends the Administrative Record (hereafter "Record") lacks
17 objective evidence of disability--specifically Defendant argues Ms. Young has not sought
18 the treatments or engaged in the behaviors typical of people suffering from severe
19 headaches and neck pain. (*Id.* at p. 11). Defendant states the "sole basis" for Plaintiff's
20 disability claim is her self-reported symptoms and Plaintiff lacks credibility. (*Id.* at 13).
21 Additionally, Defendant claims Plaintiff's arguments concerning claims handling are
22 irrelevant under a de novo standard of review.

23 **B. Standard of Review**

24 The parties have stipulated the appropriate standard of review is de novo. Under a
25 de novo standard of review, "the court simply proceeds to evaluate whether the plan
26 administrator correctly or incorrectly denied benefits." *Abatie v. Alta Health*, 458 F.3d
27 955, 963 (9th Cir. 2006). When the court is reviewing under a de novo standard of
28 review, the burden of proof is on the claimant to show she was entitled to benefits under

1 the plan. *Muniz v. Amec Const. Management*, 623 F.3d 1290, 1294 (9th Cir. 2010). The
2 parties agree the burden of proof is on the Plaintiff and she must meet that burden by a
3 preponderance of the evidence.

4 **C. The Medical Evidence**

5 Plaintiff ceased working as a Database Systems Engineer at Spokane Teacher's
6 Credit Union ("STCU") on January 1, 2014. Plaintiff claims as of that date she was
7 disabled from working at her regular occupation as a Database Systems Engineer due
8 primarily to frequent headaches and neck and shoulder pain, which may have been
9 attributable to cervical spine degeneration. Plaintiff had problems with headaches for at
10 least several months prior to leaving STCU. At a May 17, 2013 visit with her treating
11 physician, Dr. Jeffrey O'Connor, MD, she reported the headaches had been "going on for
12 over a year". (Record at 435). She reported to Dr. O'Connor she had tried icing her neck
13 and head, physical therapy, and massage therapy to alleviate the pain from the headaches.
14 In July 2013, Dr. O'Connor assessed it was more probable than not Ms. Young's
15 headaches were caused by her job. (Record at 431). The treatment plan stated changing
16 jobs would likely be the only way to eliminate the headaches. (*Id.*). Ms. Young also had
17 an MRI of her spine in May 2013. The MRI showed multiple incidences of disc "bulge"
18 and "protrusion", as well as some "moderate" canal stenosis. (Record at 514).

19 In August 2014, Dr. O'Connor responded to a residual functional capacity ("RFC")
20 questionnaire presented by Plaintiff's counsel. (Record at 821-823). He stated her
21 diagnosis as "chronic headaches and neck pain and back pain, musculoskeletal in origin."
22 (*Id.*). He stated a "trigger" for the headaches is "sitting at a computer for almost any
23 length of time." (*Id.*). He stated Plaintiff is not a "malingering", and he anticipated her
24 impairments will last for at least the next twelve months. He further opined that when
25 Plaintiff is having a headache she is not able to perform any of her basic work activities.
26 (*Id.* at 822).

27
28 Ms. Young attended appointments with an occupational physical therapist in

1 January 2015. The therapist described Ms. Young as being "very active in her care" and
2 compliant with prescribed exercises. (Record at 544).

3 During the administrative appeal, Defendant sent Plaintiff for a medical exam by
4 its retained neurologist, Dr. Zoltani, on February 14, 2015. (Record at 353). Dr. Zoltani
5 reviewed the records of Dr. O'Connor, and also of a treating chiropractor, Dr. Wickstrom.
6 Ms. Young reported to Dr. Zoltani that some physical activity exacerbated her symptoms,
7 including looking down at her computer. (*Id.* at 355). She reported she had been
8 receiving chiropractic care since February 2014, and had noticed improvement in her
9 symptoms. She reported to Dr. Zoltani she was able to drive herself, and for exercise she
10 liked to walk and do "gentle yoga stretches". (*Id.* at 357).

11 Dr. Zoltani also reviewed the MRI from May 2013, and found it showed
12 "multilevel degenerative type changes, most significant at C5-6 with some cervical cord
13 impingement." (*Id.* at 358). He diagnosed Ms. Young with: 1) chronic cervical
14 myofascial pain; 2) cervical degenerative disc disease; and 3) chronic cervicogenic
15 headaches with components of occipital neuralgia. (*Id.* at 359). He found Ms. Young to
16 have significant limitations and that her diagnosis "would preclude the following
17 occupational demands on a full time basis: Frequent sitting, occasional standing and
18 walking, exertion up to 10 pounds of force..." (*Id.*). He found that Ms. Young should
19 have "no frequent sitting" and should not have flexion of the neck "such as would occur
20 with looking down or looking up for more than 15 minutes in an hour." (*Id.* at 360).
21 Lastly, Dr. Zoltani found "no inconsistencies" in her clinical presentation. (*Id.*)

22 Dr. Zoltani's initial report supported Ms. Young's claim of disability. Defendant
23 then sent Dr. Zoltani a video surveillance tape, containing some covert surveillance
24 footage of Plaintiff obtained by the Defendant, and asked Dr. Zoltani to address several
25 additional questions. These additional questions could generously be called leading, but
26 were perhaps more accurately reflective of bias and intended to reach a desired
27 conclusion. For example, Question No. 3 (Record at 311-312) states Plaintiff's
28 complaints of pain while looking down at a computer "is inconsistent with her head

positions while walking the dog", and asks isn't it "inconsistent" with her complaints of neck pain to walk a medium sized dog, and concludes "please comment on these apparent inconsistencies". Dr. Zoltani's answer is, *en toto*, "this is inconsistent with her history". (*Id.* at 312).

The Defendant asked Dr. Zoltani an additional question which included "it is my impression that the insured does not have evidence of a physically based medical condition ... Do you agree?". Again, Dr. Zoltani concurs with the Defendant's "impression". (*Id.* at 312).

The video surveillance footage was of marginal, if any, relevance. It showed Plaintiff walking (sometimes with a dog), driving, and opening a chain link fence gate. It did not show her sitting for hours while working on a computer. It also did not show her engaging in activities which contradicted her self-reports to her attending physician and the Defendant's retained medical examiner. The original IME of Dr. Zoltani states: "She is able to perform her activities of daily living, including driving, cooking, laundry, and grocery shopping." (*Id.* at 354). Additionally, Ms. Young reported "she is able to drive and estimates that she can comfortably do this about 30 minutes, but usually 15 minutes." (*Id.* at 356). She also told Dr. Zoltani she walked "six days a week" for exercise. (*Id.* at 357). Ms. Young's reported activities of daily living did not interfere with Dr. Zoltani's initial finding that Ms. Young could not engage in "frequent sitting" and should not have flexion of the neck "such as would occur with looking down or looking up for more than 15 minutes in an hour." (*Id.* at 360).

D. Other Materials

Plaintiff submitted letters from her mother and two neighbors concerning her condition. (Record at 906-08). Plaintiff's mother states Ms. Young has been having painful headaches for over two years, and she has seen her use ice for her head and neck. She states her daughter has had to hire people to help out around the house, and she has been unable to do some of the recreational activities she enjoys. The letters from her neighbors state they have observed Ms. Young having painful headaches, Ms. Young has

1 had to restrict her activities, and they have helped her with things such as yardwork.

2 Documents from Plaintiff's personnel file were submitted, including recent
3 performance reviews. The physical requirements of her job included sitting or standing
4 for long periods of time, and the ability to operate a computer. (Record at 911). Ms.
5 Young's August 2012 performance review states in part: "Rebecca has had another
6 fantastic year, and has become a strong partner to teammates and other departments." (*Id.*
7 at 916). Generally Ms. Young's reviews appear quite positive, she received a promotion
8 from Database Administrator to Database Systems Engineer, and received several salary
9 increases over the years with STCU.

10 The aforementioned surveillance video and surveillance report (Record 365-382)
11 were submitted to and considered by the court. Plaintiff also asked the court to take
12 judicial notice of two items: 1) Defendant's financial information in the form of an SEC
13 filing, and 2) weather reports from the Spokane area for the days on which Ms. Young
14 was under surveillance. (ECF No. 26-1 and 26-2). The court declines to do so for several
15 reasons. First, this matter is a review of the administrative record and those documents
16 were not part of the Record. Second, the parties stipulated the Record was complete and
17 no additional discovery was needed. Third, the documents are not relevant to the court's
18 determination. As to the financial information, Defendant's financial strength does not
19 impact whether Ms. Young is disabled. As to the weather conditions, Plaintiff contends
20 the records were submitted "to rebut [Defendant's] suggestion that the days were sunny
21 and Young therefore would need to wear sunglasses to avoid headaches." (ECF No. 26, p.
22 7). The video images speak for themselves. A general weather report for a metropolitan
23 area does not establish whether it was sunny, cloudy, or partly cloudy at a specific
24 location at a specific time. Of greater import, Plaintiff's treating physician, Dr. O'Connor
25 stated: "Though [Ms. Young] has had significant sleep loss and ongoing pain at times she
26 doesn't seem to have a lot of nausea, vomiting, photosensitivity, or visual disturbances."
27 (Record at 821). As the medical record shows Plaintiff did not suffer from
28 photosensitivity, whether it was sunny or not is of marginal, if any, relevance.

1 **E. The Policy Provisions**

2 In denying benefits, Defendant relied on the following provisions from the Policy
3 (Record 295-96):

4 **Disability and Disabled** means that because of an Injury or Sickness, a
5 significant change in Your mental or physical functional capacity has occurred in
6 which:

7 a) during the Elimination Period, You are prevented from performing at least
8 one of the Material Duties of Your Regular Occupation on a part-time or full-time
9 basis; and

10 b) after the Elimination Period, You are:

11 1. prevented from performing at least one of the Material Duties of Your
12 Regular Occupation on a part-time or full-time basis; and

13 2. unable to generate Current Earnings which exceed 99% of Your Basic
14 Monthly Earnings due to that same Injury or Sickness.

15 After a Monthly Benefit has been paid for 2 years, Disability and Disabled
16 mean You are unable to perform all of the Material Duties of any Gainful
17 Occupation.

18 Disability is determined relative to Your ability or inability to work. It is not
19 determined by the availability of a suitable position with the Policyholder.

20 **Material Duties** means the essential tasks, functions, and operations relating
21 to an occupation that cannot be reasonably omitted or modified. In no event will
22 We consider working an average of more than the required Full-Time hours per
23 week in itself to be part of material duties. One of the materials duties of Your
24 Regular Occupation is the ability to work for an employer on a full-time basis.

25 **Regular Occupation** means the occupation You are routinely performing
26 when Your Disability begins.

27 **F. Analysis and Conclusions**

28 The denial letter stated a finding Ms. Young was not precluded from performing
the Material Duties of her Regular Occupation. The letter stated in part: "We
acknowledge Ms. Young was assessed with headaches and cervical pain. While we
appreciate **Dr. O'Connor's opinion that she is precluded from performing her job,**
the restrictions and limitations of no work are not corroborated by the documentation in
file including her demonstrated activities as noted above." (Record at p. 298-
99)(emphasis added). The denial letter goes on to state the "medical records in file do not

1 substantiate any functional deficits that would preclude Ms. Young from working and
2 there is no evidence to support she is limited due to her headaches and cervical pain." (*Id.*
3 at 299). The denial letter concludes its analysis: "In summary, the file lacks confirmation
4 of physical examinations, diagnostic testing, and/or medical documentation to
5 substantiate Ms. Young would be unable to perform the material duties of her regular
6 occupation. Therefore disability is not supported." (*Id.*).

7 The court finds Defendant's conclusion there is no medical documentation to
8 substantiate Ms. Young's claim is directly contrary to the findings by Dr. O'Connor and
9 by Dr. Zoltani in his initial IME evaluation. Dr. O'Connor's response to the residual
10 functional capacity ("RFC") questionnaire supported a finding of disability. (Record at
11 821-823). Dr. Zoltani diagnosed Ms. Young with: 1) chronic cervical myofascial pain; 2)
12 cervical degenerative disc disease; and 3) chronic cervicogenic headaches with
13 components of occipital neuralgia. (*Id.* at 359). Dr. Zoltani reviewed objective medical
14 evidence, the MRI from May 2013, and found it showed "multilevel degenerative type
15 changes, most significant at C5-6 with some cervical cord impingement." (*Id.* at 358).

16 Dr. Zoltani's initial opinion supported Plaintiff's claim, and he only amended it in
17 response to Defendant's additional questions which solicited agreement and took an
18 advocacy position against Ms. Young. Defendant also provided Dr. Zoltani with
19 surveillance footage, and it appears Defendant relied heavily in its finding of non-
20 disability on that fact that while under surveillance for a 4-day period, Plaintiff twice
21 walked her dog for approximately 30 minutes. This strikes the court as entirely
22 unreasonable. Whether Ms. Young can walk a dog says virtually nothing about her
23 ability to perform her regular occupation as a Database Systems Engineer.

24 Plaintiff was under surveillance for four days. On February 13, 2015, she was only
25 observed to be active for about two hours--she appears to have gone to a one-hour
26 healthcare appointment at Synergy Healthcare and stopped to get a take out lunch on way
27 home. (Record at 367-68). On February 14, 2015, she was observed going to her IME
28 appointment and observed driving later in the afternoon. On February 15, 2015, no

1 claimant activity was observed until approximately 11:30 a.m. when Ms. Young left to go
2 to church. Later that afternoon, after returning from work, she walked a dog for about a
3 half hour. On February 16, 2015, no claimant activity was observed until after noon. At
4 approximately 12:30 p.m., Ms. Young walked her dog for approximately a half hour.
5 Later that afternoon she was observed driving.

6 Plaintiff was followed for four days. She was observed twice going to healthcare
7 appointments and once going to church. She often did not leave the house until around
8 11:00 a.m. As stated *supra* in Section C, what was observed was not inconsistent with
9 Plaintiff's self-reports. Plaintiff's ability to walk for 30-minutes with her dog does not
10 contradict her claim of inability to work full-time as a Database Systems Engineer.

11 What occurred here is similar to the situation described by the Ninth Circuit Court
12 of Appeals in *Montour v. Hartford Life Insurance Co.*, 588 F.3d 623 (9th Cir. 2009).
13 Montour made a claim for long term disability benefits under an ERISA plan. Hartford
14 hired a contractor to conduct surveillance of Montour for four days. The District Court
15 found that Hartford "overstates and over-relies on surveillance" and that the activities
16 observed were "brief and consistent with Plaintiff's self-reported limitations." *Id.* at 633.
17 The District Court stated: "that Plaintiff could perform sedentary activities in bursts
18 spread out over four days does not indicate that he is capable of sustaining activity in a
19 full-time occupation." *Id.* The Ninth Circuit cited with approval the District Court's
20 analysis and found the insurer's conduct evidenced bias and the insurer's case manager
21 had taken an "advocacy position" with Montour's physicians and solicited the doctors
22 agreement with the insurer's disability conclusion. *Id.* at 634.

23 The surveillance video of Ms. Young does not depict activity inconsistent with her
24 reported limitations. The video does not demonstrate Ms. Young has the ability to work
25 full-time in her regular occupation. The questions posed by Defendant to Dr. Zoltani,
26 and responded to in the addendum to the IME report, show Defendant taking an advocacy
27 position towards a conclusion of non-disability, and the responses unfortunately show the
28 'independent' medical examiner acquiescing to Defendant's advocacy. In *Chellino v.*

1 *Kaiser Foundation Health*, 352 Fed.Appx. 164 (9th Cir. 2009), Dr. Krames issued an
2 opinion finding the claimant was 100% disabled and then was asked to view surveillance
3 video by the insurer. He then issued a supplemental report finding claimant not disabled.
4 The Ninth Circuit reversed the denial of benefits and found the activities shown on the
5 surveillance footage were consistent with claimant's subjective complaints and self-
6 reported limitations. *Id.* at *2; see also *Thivierge v. Hartford Life*, 2006 WL 823751
7 (N.D. Cal. 2006)("The doctors noted that Plaintiff was observed on the video surveillance
8 walking, driving, and doing errands; however, doing those activities for a couple of hours
9 on five out of six days she was under surveillance does not mean that Plaintiff is able to
10 work an eight-hour a day job."); *Beaty v. Prudential Ins.Co.*, 313 Fed.Appx. 46 (9th Cir.
11 2009)(district court drew "unsupportable inferences from a surveillance video and reports
12 which show the plaintiff engaging in a variety of normal day-to-day activities" and failed
13 to explain how those activities "demonstrate she can perform the duties of her occupation
14 as a vice president of underwriting").

15 Similar errors were made by Defendant herein. When virtually all of the medical
16 evidence supported Plaintiff's claim, including the initial report from Defendant's retained
17 expert, Dr. Zoltani, Defendant overly relied on surveillance video that was of marginal, if
18 any, relevance to the disability determination and used it to sway the position of Dr.
19 Zoltani through a series of questions which solicited his agreement with Defendant's
20 conclusions.

21 **III. Conclusion**

22 Plaintiff has established she was disabled under the Policy and unable to perform
23 the material duties of her regular occupation. Plaintiff's Motion For Judgment On The
24 Record is Granted.

25 The court turns now to the issue of the relief requested. Plaintiff's Motion seeks an
26 award of "past-due and continuing benefits" in the amount of \$4,167.43/month plus a
27 \$300/month benefit for health care. Plaintiff further seeks an award of prejudgment
28 interest. It appears Plaintiff contends benefits should have begun on April 1, 2014, after

1 the 90-day elimination period under the Policy. On the issue of damages, Defendant has
2 stipulated in its response brief the court may award pre-judgment interest. (ECF No. 31,
3 p.17 n.2). Defendant argues Plaintiff cannot be awarded "continuing benefits" because
4 she has argued she is disabled from returning to her "regular occupation" and thus the
5 maximum award of benefits is two-years. If benefits commenced on April 1, 2014, the
6 two year period would expire in the near future, on April 1, 2016. Plaintiff has stated
7 "she is not alleging total disability from all substantial gainful activity in the national
8 economy" and has not applied for Social Security benefits. (ECF No. 32, p. 9).

9 Plaintiff has established she is disabled from performing the material duties of her
10 regular occupation within the meaning of the Policy. The parties briefing did not focus
11 extensively on the issue of damages. Plaintiff's brief sets forth the monthly benefit, and
12 that information is in the Record. Additionally, mention is made of COBRA benefits for
13 18-months being included in the damage award. However, Plaintiff's Declaration (ECF
14 No. 27) appears to contend she paid healthcare premiums under COBRA for 8-months.
15 The parties' positions are also unclear as to the benefit start date. It appears Plaintiff
16 contends it is April 2014. Defendant contends in briefing it is "irrelevant" that Defendant
17 misstated Plaintiff's last date of work in its denial letter. There are also references in the
18 Record to a benefit start date of June 2014.

19 **IT IS HEREBY ORDERED:**

20 1. Plaintiff's Motion for Judgment On The Record (ECF No. 26) is **GRANTED**.

21 2. The parties shall promptly confer in an effort to furnish the court with a
22 stipulation as to damages to be awarded. Such a stipulation shall be filed on or before
23 **March 30, 2016**.

24 3. If agreement on damages is not reached, the parties shall submit supplemental
25 briefs on the issue of damages, containing specific calculations as to prejudgment
26 interest, benefit commencement date, COBRA benefits, etc. as outlined above. The
27 briefs on damages shall not exceed 7 pages. Plaintiff shall also submit a proposed
28 judgment containing the damages calculation. Defendant may, but is not required to,

1 submit a proposed judgment. The briefs and proposed judgments shall be filed **no later**
2 **than April 15, 2016.**

3 **IT IS SO ORDERED.** The Clerk shall file this Order and furnish copies to
4 counsel.

5 **DATED** this 25th day of February, 2016.

6 s/ Justin L. Quackenbush
7 JUSTIN L. QUACKENBUSH
8 SENIOR UNITED STATES DISTRICT JUDGE
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